

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs January 23, 2008

**STATE OF TENNESSEE v. JIMMY HEARD**

**Appeal from the Circuit Court for Rutherford County**  
**No. F-58542A      Don R. Ash, Judge**

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**No. M2007-01805-CCA-R3-CD - Filed March 18, 2009**

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Following the return of a multi-count indictment, Defendant was convicted of criminal conspiracy to commit aggravated robbery, a Class C felony; aggravated robbery, a Class B felony; the lesser included offense of attempted second degree murder, a Class B felony; and two counts of felony evading arrest, a Class E felony. Defendant filed a motion for new trial arguing, among other issues, that the trial court erred in providing a supplemental instruction to the jury that it could proceed to consider the lesser included offense of attempted second degree murder in count 3 of the indictment if it could not unanimously agree as to a verdict of guilt or acquittal on the charged offense of attempted first degree murder. At the conclusion of the motion hearing, the trial court found that the challenged supplemental instruction as to count 3 of the indictment was provided in error. The trial court granted Defendant's motion for new trial as to count three of the indictment charging Defendant with attempted first degree murder, and denied the motion in all other respects. The trial court denied the State's request for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. However, this Court granted the State's Rule 10 application for an extraordinary appeal by permission in which the State challenges the trial court's grant of a new trial on the charged offense of attempted first degree murder. After a thorough review of the record and the briefs of the party, we affirm the trial court's grant of Defendant's motion for new trial as to count 3 of the indictment.

**Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and J. Paul Newman, Assistant District Attorney General, for the appellant, the State of Tennessee.

Brad W. Hornsby and Luke A. Evans, Murfreesboro, Tennessee, for the appellee, Jimmy Heard.

## OPINION

### I. Background

This appeal concerns only count 3 of the indictment in which Defendant was charged with the attempted first degree murder of Casey Huey. Initially, the trial court charged the jury that if it had reasonable doubt as to Defendant's guilt of any charged offense, then its verdict must be not guilty as to this offense, and then the jury was to consider the lesser included offenses in sequential order. See Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim 41.01; State v. Raines, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994) (upholding the provision of "acquittal first" jury instructions).

During its deliberations, the jury sent the following question to the trial court: "[I]f we do not agree on the attempted first degree murder do we need twelve votes of not guilty before we proceed to count 3A?"

In a hearing out of the presence of the jury, the trial court read the question to the State and defense counsel, and both parties initially answered the question, "Yes." The following colloquy then occurred:

THE COURT: But do they need twelve votes – you don't need [twelve] votes not to – you don't need a unanimous verdict to say we can't [agree] on . . . the first degree. See, if they're hung up on the first one, let's say its 6 - 6 and then if they can't agree then they go to the lesser included offense. Is that not right? And what they say here is in order to go to the next one they've got to get twelve votes of not guilty. That's not correct[?]

[DEFENSE COUNSEL]: I would agree.

THE COURT: [Prosecutor], you look like you're not sure what I'm talking about.

[PROSECUTOR]: I know exactly what you're talking about.

THE COURT: So what do you think?

[PROSECUTOR]: What concerns me about that is that – and if they do drop down and they may agree, which that would be fine with me, but they don't know nor does any jury know that if they do that that it is a not guilty to the higher offense. If this case ever comes back on appeal that's not an option for the State. So in a sense I agree

that they could drop down, but in doing so they don't realize that, the ones that are holding out for first degree, if they compromise that they're in fact acquitting him of that offense.

[DEFENSE COUNSEL]: And I don't think it has to be not guilty or guilty. I think they're just one – whatever way they're hung up.

THE COURT: Right. And they can't reach a verdict on.

[DEFENSE COUNSEL]: They were acting like you had to have twelve not guilty's to go to the next. I don't think you have to have twelve not guilty's. I think one not guilty would be enough to go down to a lesser included.

THE COURT: Right. I agree. . . .

[PROSECUTOR]: I'll defer to [defense counsel] and see what his preference is. And then depending on . . . if he wants them to go to the lesser included, the State does, too. If [defense counsel] doesn't – but I mean its his choice.

[DEFENSE COUNSEL]: Honestly, I probably need to look into it a little bit. . . . I've never had the issue where –

THE COURT: I'm telling you there's a case within the last year where it said where a jury was hung up and the judge then once they were hung up said then you're to go to the lesser included offenses.

[DEFENSE COUNSEL]: That's what I was thinking.

[PROSECUTOR]: I'm not opposed to the Court instructing that if you're confident of that.

When the jury was returned to the courtroom, the following colloquy occurred:

THE COURT: The question you asked me is if you do not agree on the attempted first degree murder do we need 12 votes of not guilty before we proceed to count 3A. The answer to that is no. What can happen is let's say – normally what would happen on let's say count 3[,]

the attempted first degree murder if that's what you're talking about and y'all [sic] could not reach a verdict then that means that you as a jury could not reach a unanimous verdict on that count. So if you came back and told me we could not reach a verdict on that count[,] I would say then I want you to consider the lesser included counts. So on the verdict form let's say that you cannot reach a unanimous verdict either guilty or not guilty on count 3 of the attempted first degree murder. I want you to write in there "could not reach a unanimous verdict" on that count. Everybody understand? On the original charge. And then you drop down to the lesser included offenses until you find a count, if you can, where you can have a unanimous verdict[,] whether that be guilty or not guilty. Did I say it right?

[DEFENSE COUNSEL]: With the other exception they could go all the way through all the lesser includeds and then go to the alternative charge.

THE COURT: That's true. That's exactly right. You're exactly right, [defense counsel]. Or you could go all the way through that and not be able to reach a unanimous verdict on any of those lesser includeds of the aggravated [sic] first degree murder and write in there[,] could not reach a unanimous verdict and then drop down to the aggravated assault. Did I say that right, [defense counsel]?

[DEFENSE COUNSEL]: Yes, sir.

For count three on the jury verdict form, the jury marked "could not reach unanimous decision" regarding the charged offense of attempted first degree murder. The jury convicted Defendant of the lesser included offense of attempted second degree murder for count 3 of the indictment.

In his motion for new trial, Defendant argued that the trial court erred in providing a supplemental instruction to the jury that it could proceed to consideration of the lesser included offense of attempted second degree murder after the jury could not reach a unanimous decision as to count three. Specifically, Defendant asserted in his motion for new trial:

3. The court deprived Defendant of a unanimous jury verdict. In particular, Defendant would assert the jury was not unanimous on the charged offense of attempt to commit first degree murder. **Instead of having a hung jury and a mistrial**, the court permitted the jury to not reach unanimity on said charge and instead proceed to other offenses and lesser included offenses. (Emphasis added).

Thus Defendant's position in the trial court was that the trial court erred by failing to grant a mistrial as to the indicted offense in attempted first degree murder. The trial court granted Defendant's motion for new trial on this issue (and denied the motion as to all other issues) stating:

[h]owever, of greater concern to the Court is the defendant's third argument, in which the defendant argues the Court improperly instructed the jury as to their deliberations on the charged offense of attempt to commit first degree murder. In a review of the transcript, there was a discussion between the attorneys and the Court as to the instruction of the jury regarding deliberations. After these arguments, the Court instructed the jury to consider the lesser included offenses. After further review of the applicable law, the Court believes it erred in not declaring a mistrial as to this count.

## II. Propriety of Trial Court's Jury Instruction

On appeal, the State argues first that the trial court abused its discretion under the "invited-error rule" by granting Defendant a new trial as to count three of the indictment. That is, Defendant asked the trial court to instruct the jury that unanimity was not required as to the charged offense before the jury could consider the lesser included offense. Alternatively, the State contends that the trial court's instruction to the jury was not error and is consistent with our supreme court's guidance as set forth in State v. Burns, 6 S.W.3d 453 (Tenn. 1999) and State v. Ely, 48 S.W.3d 710 (Tenn. 2001).

In response, Defendant denies that he invited the error which was the basis for the grant of a new trial but contends that it was the trial court's decision to depart from an "acquittal-first" jury instruction. Alternatively, Defendant, changing his position on appeal, joins the State in arguing that the trial court's instruction was proper and therefore not error. Defendant also contends for the first time on appeal that the trial court's grant of a new trial on the charged offense of attempted first degree murder violates double jeopardy principles.

The issue raised in this appeal concerns "transition" jury instructions which direct the jury how to proceed from consideration of a charged offense to the consideration of one or more lesser included offenses. The various states and federal jurisdictions have generally adopted four different approaches. The first approach, as adopted in Tennessee, is the "acquittal first" approach which requires unanimous acquittal of the charged offense before the jury may proceed to deliberate on the lesser included offenses. See e.g. State v. Davis, 266 S.W.3d 896, 904-908 (Tenn. 2008); State v.

Daulton, 518 N.W.2d 719 (N.D. 1994); People v. Boettcher, 69 N.Y.2d 174, 513 N.Y.S.2d 83, 505 N.E.2d 594 (1987).

A second approach, the “unable to agree” approach, instructs the jury that they may consider a lesser included offense if they have reasonably tried, but failed, to reach a unanimous decision on the charged offense. See e.g. Green v. State, 80 P.3d 93 (Nev. 2003); State v. LeBlanc, 924 P.2d 441 (Ariz. 1996); State v. Thomas, 533 N.E.2d 286 (Ohio 1988). The supplemental instruction provided by the trial court in the case sub judice reflects this approach.

The third approach permits the jury to consider the charged offense and the applicable lesser included offenses in any order they wish, but requires a unanimous vote of acquittal on the charged offense before the jury may convict of a lesser included offense. People v. Kurtzman, 758 P.2d 572 (Cal. 1988); Dresnek v. State, 697 P.2d 1059 (Alaska Ct. App. 1985).

Finally, the fourth approach, or “optional” approach, allows the defendant to choose between the “acquittal first” and “unable to agree” instructions. If the defendant does not make a selection as to which approach is desired, the trial court may properly use either instruction. United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978); Jones v. United States, 620 A.2d 249 (D.C. 1993).

The State contends that an “unable to agree” instruction, as well as an “acquittal first” instruction is consistent with the principles set forth in Burns and Ely. See Tenn. Op. Att’y Gen. No. 06-006, 2006 WL 370929, at \*2 (concluding that “unable to agree” instructions “promote efficiency by supplying an orderly structure for the jury’s deliberations and at the same time insur[ing] that the jury is afforded the opportunity to reach a unanimous verdict concerning every charge in the sequence consistent with the defendant’s rights as Burns conceives them to be”).

Nonetheless, our supreme court recently addressed a challenge to a trial court’s use of an “acquittal first” jury instruction similar to the one presented in the case sub judice. State v. Davis, 266 S.W.3d 896 (Tenn. 2008). After reviewing the four approaches reflected in transitional instructions used throughout the various jurisdictions, the court held that the “acquittal first” instruction does not violate a defendant’s state constitutional right to trial by jury and that “significant policy considerations favor the continued use of acquittal-first instructions.” Id., at 908. Accordingly, under Davis, we conclude that the trial court erred in providing the jury an “unable to agree” supplemental jury instruction.

Accordingly, the trial court erred when it gave its supplemental jury instructions which allowed the jury to consider lesser included offenses of the charged offense in count 3 when the jury clearly had not agreed to acquit Defendant of the charge of attempted first degree murder. Defendant asserted, at least implicitly, in his motion for new trial that the trial court should have declared a mistrial as to count 3 based upon a “hung jury.” The trial court agreed with Defendant and granted Defendant a new trial as to count 3. We conclude that the trial court did not err by granting a new trial. The State is not entitled to relief in this appeal.

## **CONCLUSION**

After a thorough review, we affirm the trial court's grant of a new trial as to count 3 of the indictment and remand this matter for proceedings consistent with this opinion.

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THOMAS T. WOODALL, JUDGE